No. 82-1723

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

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PYRAMID LAKE PAIUTE TRIBE OF INDIANS,
*Petitioner,*

v.

TRUCKEE-CARSON IRRIGATION DISTRICT, STATE OF NEVADA, UNITED STATES OF AMERICA, *et al.*,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## STATE OF NEVADA'S BRIEF IN OPPOSITION TO PETITION FOR LEAVE TO INTERVENE AND OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

We submit that the questions presented by the petitioner would be more properly phrased as follows:

I. Should an Indian tribe be granted intervention for the first time in this Court for purposes of petitioning for a writ of certiorari when: (a) the Tribe claims no property right in the quiet title action for itself, (b) intervention has been twice denied by the lower courts at two separate stages of the proceedings below, (c) the United States, trustee for the Tribe, has declined to seek a writ of certiorari on behalf of the real party in interest, and (d) the substantive questions for which review is sought deal not with any point of Indian law, but rather with questions relating to non-Indian water rights on a federal reclamation project?

II. Should the concurrent findings of fact of both courts below that, under Section 8 of the Reclamation Act, actual beneficial use is the basis and measure of the project water rights, be overturned on the basis of inconsistently administered reclamation project water contracts?

III. Whether both courts below erred in finding that the Nevada State Engineer has primary administrative jurisdiction to approve changes in the use to which water will be put on a federal reclamation project when: (a) there is no specific federal statute governing modifications, (b) the United States will receive notice of each application for a change, (c) the United States may participate in the proceedings, and (d) the Federal District Court has reserved jurisdiction for purposes of review?

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### STATEMENT OF THE CASE

This virtually-comprehensive water rights suit was brought by the United States in 1925 to quiet title to all water rights to the Carson River. It is believed to be the oldest active case pending in the federal courts. The United States is not seeking to quiet title to any Indian water rights, because there are no such claims on the Carson River.[1] The United States brought the action to

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[1] The Pyramid Lake Paiute Tribe claims no rights to the use of the Carson River. Likewise, Carson River water for the cutthroat trout and the cui-ui has never been an issue in this case.

secure water rights for the Newlands Reclamation Project, which also utilizes Truckee River water rights.[2]

The majority of Newlands Project farmers obtained their water rights by purchase thereof from the United States. The purchase contracts took many forms, some of which purported to limit the duty of water to 3 acre feet per acre ("afa"), while many others contained no specific amount limitation. As noted by the Court of Appeals, there has been no consistent administrative determination that 3 afa was the proper water duty for the Newlands Project. Pet. App. 9.

The case was tried before a Special Master between 1929 and 1940. The District Court entered a preliminary determination and temporary restraining order on March 24, 1950, decreeing a 2.92 afa duty for the Newlands Project. The order specifically provided that it was entered "without prejudice to any water claimants' rights to be determined upon the final adjudication herein." The 2.92 afa limitation, however, was not actually utilized. In 1958 the Special Master filed an amended report and a proposed final decree which generally called for a 5.0 afa water duty.

Ten years later (and 43 years after the filing of the complaint), in March 1968, the Tribe moved to intervene in the District Court. The court denied the Tribe's motion on the grounds that the Tribe had no interest in the waters of the Carson River, the motion was untimely, and the Tribe's interest in the Truckee River was adequately represented by the United States. The Ninth Circuit upheld this ruling, and this Court denied certiorari. *United States* v. *Alpine Land & Reservoir Co.*, 431 F.2d 763, *rehearing denied*, 431 F.2d 763 (9th Cir. 1970), *cert. denied*, 401 U.S. 909 (1971).

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[2] *See Nevada* v. *United States*, Nos. 81-2245, 81-2276 & 82-38, now pending before the Court.

On February 15, 1974, the District Court entered an order to show cause, directing all parties in interest to appear and demonstrate why the proposed findings of fact, conclusions of law, and decree of September 18, 1951, as modified on July 14, 1958, should not be adopted and approved as the basis for the final decree. The court noted that the reports of the Special Master comprised an appropriate foundation for further proceedings. Finally, the court also noted that "under the circumstances, it is appropriate that we should start anew in an effort to resolve inequities, illegalities and discrepancies, if any, in the reports of the special master to the end that the use of the waters of the Carson River and its tributaries shall be finally adjudicated and determined."

The pretrial order, agreed to by the United States and the Truckee-Carson Irrigation District ("TCID") provided in part:

> The United States challenges the 5 acre feet per acre duty determined by the special master on the grounds that it is not consistent with the evidence presented. The United States intends to present additional evidence regarding the appropriate water duty, but has not yet reached its final conclusions as to the proper duty.

Thus it is clear, despite the contentions of petitioner, that an evidentiary hearing on the proper duty of water for the Newlands Project was specifically contemplated and sought by the United States.[3]

The District Court rendered its opinion on October 28, 1980. The water duty for the Newlands Project was ad-

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[3] Though the United States indicated in the pretrial order that it intended to make legal arguments that might affect the water duty, it never contended that the court should not hear the evidence that was ultimately received as to the actual beneficial use of water for the project lands.

judged to be 3.5 afa for bottom lands and 4.5 afa for bench lands. These duties, based on evidence pertaining to the use of Carson River water, were identical to the amounts fixed by the *Orr Ditch* court for Truckee River water utilized on the Newlands Project. *United States* v. *Orr Water Ditch Co.*, Equity A-3 (D. Nev. 1944); *see Nevada* v. *United States*, Nos. 81-2245, 81-2276 & 82-38, pending before this Court.

The court also ruled that any application to change the place of diversion, manner of use, or place of use of Carson River water in Nevada must be filed with and approved by the Nevada State Engineer, and that any party aggrieved by his determination could petition the District Court, which retained jurisdiction over the case for that purpose. The court further found that there was no "specific congressional directive" that would vest the Secretary of Interior with the jurisdiction to handle change applications for the Newlands Project. Pet. App. 82-83. Accordingly, all Nevada Carson River water rights were determined to be subject to the same modification procedures.

On an appeal by the United States, the Court of Appeals unanimously upheld both of these rulings.

Petitioner appeared as *amicus curiae* before the Court of Appeals, sharing the time of the United States at oral argument, and raised the same substantive arguments made here. Subsequent to the decision of the Ninth Circuit panel, the Tribe, upon learning that the United States did not intend to seek further review, moved the Court of Appeals to intervene in the case or, in the alternative, to substitute for the United States as plaintiff for the purpose of seeking rehearing. On April 1, 1983, the Court of Appeals denied the motion. Pet. App. 20. No party below has filed for a writ of certiorari or sought an extension of time to do so. On May 3, 1983, the District Court entered the mandate.

## REASONS FOR DENYING THE WRIT

### 1. *Applicant Has Failed To Make The Extraordinary Showing Necessary To Justify Intervention In This Court.*

Applicant put forth its interest—indirect at best—in the Carson River adjudication when it attempted to intervene in 1968. Pet. App. 107-112. The District Court's denial of the Tribe's motion was affirmed by the Court of Appeals, rehearing was denied, and this Court denied the Tribe's petition for a writ of certiorari. Pet. App. 107; 401 U.S. 909. Fifteen years later, the Tribe again attempted to intervene, asserting an argument similar to the one made here, when it attempted post-decision intervention in the Ninth Circuit. Significantly, *the Tribe has not sought review of the Ninth Circuit ruling denying intervention.* Pet. App. 20. Instead, applicant is seeking to intervene in this Court independent of the proceedings below.

It must be noted that applicant has not claimed that its oblique interest in the Carson River was inadequately represented below. There is no claim that the United States failed to make any argument or take any position contrary to the applicant's wishes or interests.[4] Pet. 16. Applicant was granted leave to file an *amicus* brief in the Ninth Circuit, and shared oral argument with the United States.[5]

The Tribe has sought intervention in this Court simply because the Solicitor General, exercising his statutory discretion, decided not to petition this Court for a writ of certiorari. Pet. App. 15. *See* 28 U.S.C. § 518. In so doing, the Tribe has not presented any issue related to

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[4] The Justice Department attorney who acted as lead counsel in the 1979 hearing before the District Court has been engaged by the petitioner as counsel of record herein. Said counsel also appeared on the brief of the United States in the Court of Appeals.

[5] Therefore, the Tribe cannot satisfy the requirements identified in *Arizona* v. *California*, 51 U.S.L.W. 4325 (U.S., Mar. 30, 1983).

Indian law. Both of the substantive questions in its petition relate to the Reclamation Act of 1902 and to the administrative jurisdiction of the Secretary of Interior. Whether these issues are appropriate for review by this Court is properly the province of the Solicitor General and the United States, not a non-federal amicus below.[6]

The only new matter the Tribe has offered in support of its motion is the decision in *Pyramid Lake Paiute Tribe of Indians* v. *Morton*, 354 F. Supp. 252 (D.D.C. 1973). But the Tribe is incorrect in asserting that the consequences of that case provide an issue different from those already decided by the prior orders denying intervention.[7]

Applicant concedes, quite candidly, that the heart of its interest in this case is the possibility of having the outcome of the *Morton* case become moot. Pet. 12. Though the *Morton* court did not rule on water duties, it considered the 2.92 afa water duty established in the temporary decree in this case as part of the basis of its decision. The Newlands Project farmers were not parties to that case, so that no evidence was received by the *Morton* court from the real parties in interest as to the proper duty to be utilized for the Newlands Project.

Moreover, the *Morton* court specifically recognized that the *Alpine* case would ultimately determine the final, appropriate water duty for the Newlands Project:

> The parties and this Court of course recognize that neither the Secretary nor this Court can adopt or require a regulation that would infringe upon these [*Orr Ditch* or *Alpine*] decrees * * *. [Pet. App. 33.]

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[6] Indeed, we question the Tribe's standing to assert these matters. *See Massachusetts* v. *Mellon*, 262 U.S. 447, 485-486 (1923) (State does not have standing to enforce its citizens' federal constitutional rights against the United States); *see also Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 102 S. Ct. 3260, 3270 n.16 (1983).

[7] This contention was not accepted by the Court of Appeals when it denied post-decision intervention in this action.

Thus, applicant has known since 1973 that the outcome of *Alpine* would directly impact on *Morton*, yet it sought no appeal from *Morton* on that point, and failed to seek timely intervention in this case in light of the *Morton* decision under the "new development" theory now advanced here.

Accordingly, applicant should not be granted leave to intervene at this late post-decision stage, because it has, at best, only a tangential interest in this action, and because it either by-passed other opportunities in this case and in *Morton* or was turned down by the courts below.

### 2. *Petitioner Is Seeking Review Of A Factual Finding Made Concurrently By Both Courts Below.*[8]

As the Court of Appeals observed, the beneficial use controversy here is essentially a question of fact. Pet. App. 11. The Court of Appeals specifically held that the District Court's finding of fact that 3.5 afa and 4.5 afa were the proper water duties for the Newlands Project was supported by substantial evidence and that such duties were measured by beneficial use in accordance with Section 8 of the Reclamation Act. Pet. App. 13.

No one has ever challenged the correctness of these findings. Rather than attempt to attack the District Court's finding of fact as clearly erroneous, the United States and the petitioner unsuccessfully took a different tack on appeal. Pet. App. 12.

First, the Government argued that Nevada's Cooperative Act of 1903 (Nev. Stats., Chap. IV, Sec. 2) limits water duty at the Newlands Project to 3 afa.[9] The Court of Appeals rejected that argument, and no review is

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[8] These comments need be considered only in the event that the Court grants the Tribe's motion to intervene.

[9] Nevada repealed this Statute in 1905, Nev. Stats., Chap. XLVI, Sec. 1. Subsequent enactments limited the water duty not to an arbitrary figure, but to beneficial use. *See* NRS 533.035.

sought of the determination of both courts below that this Nevada statute is wholly inaplicable to the water duty determination.

Second, the Government argued below that, to the extent that there were contracts with a 3 afa limitation, those contracts should override the evidence as to the actual, beneficial use for those project lands. The Court of Appeals rejected that argument as well. Petitioner now seeks review of this conclusion, claiming that it is an important issue. Petitioner does not argue that there is any conflict in the Circuits. Indeed, the Ninth Circuit's interpretation of these contracts is fully consistent with the interpretation given to similar contracts by the District of Columbia Circuit. *Fox* v. *Ickes*, 137 F.2d 30 (D.C. Cir.), *cert. denied*, 320 U.S. 792 (1943). Nor does petitioner contend that reliance on the Reclamation Act in the face of inconsistently-applied administrative determinations conflicts with any decision of this Court. To the contrary, the Court of Appeals specifically relied on *California* v. *United States*, 438 U.S. 645, 678 n.31 (1978), in ruling that Section 8 of the Reclamation Act, mandating a beneficial use standard, is a "specific congressional directive" which acts as a "restraint upon the Secretary." Pet. App. 7.

Petitioner argues, citing *Sporhase* v. *Nebraska*, 102 S. Ct. 3456 (1982), and *Colorado* v. *New Mexico*, 103 S. Ct. 539 (1982), that the decisions below are inconsistent with this Court's efforts to encourage water conservation. The Court of Appeals, however, specifically focused on the possibility of waste when analyzing the evidence before and the reasoning of the District Court. Pet. App. 5-6. The Court of Appeals, furthermore, specifically based its ruling on the evidence in the record that there was no waste or inefficiency on the Newlands Project, and that the reduction to the 3 afa water duty sought by the United States would drastically reduce the farmers' yields over the long term. Pet. App. 12. That factual finding does not merit further review.

The rulings below were eminently correct and consistent with the well-established authority that beneficial use (exclusive of waste) is the proper measure and basis of a water right duty. If the United States had an objection to a *de novo* hearing to consider evidence of beneficial use, it was waived by its failure to object or preserve the issue on appeal.

### 3. *Both Courts Below Were Correct In Recognizing That The Nevada State Engineer Has Primary Administrative Jurisdiction To Approve Or Reject Proposed Changes In The Use Of Decreed Water Rights.*

The District Court reviewed Nevada's comprehensive scheme of water rights regulation. *See* Pet. App. 104. NRS 533.325 requires any appropriator who wishes to change the point of diversion, manner of use, or place of use of water already appropriated to apply to the State Engineer for a permit for any such change. NRS 533.345 through 533.365 provide for modification applications and their contents, notice and protest procedures, and other administrative details. The State Engineer's duties and responsibilities in approving or rejecting applications are well detailed in NRS 533.370.

The District Court held that the Nevada statutory procedures control for all Nevada water rights for which a change is sought. The court, however, relying on the Nevada statutes, specifically reserved the power to review decisions by the State Engineer. Pet. App. 105; *see* NRS 533.450.

The United States appealed this ruling only insofar as it related to changes on the Newlands Project. The United States did not appeal the District Court's ruling as to the general applicability of this procedure to the Nevada rights in the *Alpine* decree. The basis for the Government's appeal was its concern that the State Engineer may not give proper weight to federal interests.

That argument was properly rejected by the Court of Appeals. Pet. App. 13-15. The Court of Appeals found that the notice and protest procedures of Nevada law are adequate to explore and protect all federal issues and interests, if and when they arise. The Court of Appeals also based its ruling on *California* v. *United States, supra*, which had held that state law will control the distribution of water rights absent a preempting federal directive. The Court of Appeals agreed with the District Court that

> the conspicuous absence of transfer procedures, taken in conjunction with the clear general deference to state water law, compels the conclusion that Congress intended the transfers to be subject to state water law. [Pet. App. 14.]

Petitioner has not identified any specific statutory authority either permitting or requiring the Secretary of Interior to assert administrative jurisdiction over reclamation project change applications. The citation of statutes providing general regulatory authority falls far short of the "specific congressional directive" envisioned by *California* v. *United States* in respect to change procedures. *See* 43 U.S.C. §§ 373, 440. Moreover, as a matter of policy, it is far more desirable to have all decreed water rights within a State subject to the same modification procedures. The Nevada State Engineer, under a comprehensive statutory scheme, has a staff of experienced engineers with extensive expertise in processing these applications and following the appropriate procedures. The United States will receive notice of each application and may participate in any proceedings. NRS 533.110, 533.130. The State Engineer is bound to follow all applicable federal law. In addition, the decree provides for the review of modification rulings by the District Court. Federal interests in the operation of the reclamation project are therefore fully protected.

There is no contention that there is a conflict among the Circuits on this issue or any other issue in the case.

The points raised by petitioner are peculiar to this case and unlikely to recur. And, finally, we respectfully submit that the courts below correctly applied the law and, in particular, *California* v. *United States*. Further review is therefore unwarranted.

## CONCLUSION

For the foregoing reasons, the application to intervene and the petition should be denied.

Respectfully submitted,

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